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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-813

ARMANDO CAPONIGRO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, ARMANDO CAPONIGRO, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered August 25, 1972, and denial of Petition for Rehearing entered without opinion on October 4, 1972.

(a) JURISDICTION

Jurisdiction of this Court is invoked under the provisions of Rule 19(b) of the Supreme Court Rules, specifically in that the Courts below have decided a Federal question in a way in conflict with applicable decisions of this Court and have departed from the accepted and usual course of judicial proceedings in such manner as to call for exercise of this Court's power of supervision.

The judgment of conviction was entered in the U.S. District Court for the Southern District of Florida on September 30, 1971. The opinion sought to be reviewed was entered August 25, 1972 (a copy is appended as Exhibit 'A'). The order denying rehearing was entered October 4, 1972 (a copy is appended as Exhibit 'B'). Order extending time for filing Petition for Writ of Certiorari was entered on November 6, 1972 (a copy is appended as Exhibit 'C').

The statutory provision believed to confer jurisdiction to review the foregoing judgments and opinions is Title 28, Section 1254 (1).

(b) QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A CONVICTION OF EXTORTION CAN LEGALLY BE ENTERED WHEN ALL THE EVIDENCE SHOWS THAT ALL MONIES INVOLVED WERE PAID VOLUNTARILY.

II

AT A TRIAL THE INTRODUCTION INTO EVIDENCE OF PRIOR UNSWORN TESTIMONY GIVEN UNDER DURESS AT A UNION HEARING DEPRIVES A DEFENDANT OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION, AND SIXTH AMENDMENT RIGHT TO COUNSEL.

(c) CONSTITUTIONAL PROVISIONS

The following Constitutional provisions are involved:

Amendment V

"No person shall . . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The following statute is involved:

Title 18, § 1951(b)(2)

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

(d) STATEMENT OF THE CASE

An Indictment was returned in the United States District Court for the Southern District of Florida charging petitioner with obstruction of interstate commerce by extortion in violation of Title 18, USC 1951. Count I charged that petitioner extorted Five Hundred and Forty Three Dollars from C. A. Gibeaut by force and fear in threatening work stoppages and other labor troubles. Count II charged that petitioner obstructed commerce by attempting to obtain property through wrongful use of force and fear by threatening a representative of C. A. Gibeaut Company.

In 1969 C. A. Gibeaut Company was a sub-contractor, doing concrete work on a major apartment house project in Hallandale, Florida. Gibeaut ordered plywood and four by fours from a company located in Ohio. Goods were shipped in interstate commerce to Gibeaut.

William Orton was a Vice President of the company. (Tr. 578). William Harrington was Superintendent of the project in 1969. (Tr. 64). Petitioner, Armando Caponigro was a shop steward employed primarily by Burk Builders, the contractor on the job. (Tr. 66).

In February or March of 1969 Caponigro wanted to borrow Five Hundred Dollars from C. A. Gibeaut Company. He made the request to Orton. The request was denied the next day.

In July of 1969, Caponigro was put on the C. A. Gibeaut payroll by Orton. Caponigro was paid July 23, 1969, July 30, 1969, August 6, 1969, August 13, 1969 and August 20, 1969. (Tr. 97). He was not paid thereafter. (Tr. 104). There were no other conversations between Orton and Caponigro other than a request, at Christmas of 1969, for a Christmas bonus. The request was turned down. (Tr. 105-106). The checks paid to Caponigro totaled Five Hundred and Forty Three Dollars. (Tr. 192).

Harrington met Caponigro in December of 1968. (Tr. 112). Caponigro asked Harrington for a kickback after a carpenter's strike had terminated. The request was rejected. (Tr. 113). The same request was made a few times thereafter. (Tr. 114). Harrington explained that he had no power to acceed to the request. (Tr. 115). During the period that Caponigro was paid, Harrington was out of town for two and one-half weeks. They had no conversation during the July and August period of payments. (Tr. 118-119).

After the last payments had been made, Harrington stated that Caponigro requested more money and said he could make it tough on him, if he didn't come across. (Tr. 121). No further payments were made. There were no conversations with Caponigro until just prior to Christmas of 1969. (Tr. 127). At Christmas time Caponigro asked for a bonus again. Harrington told him it had been received during the summer. Harrington stated that

Caponigro threatened him with a .45. (Tr. 131). Harrington told Caponigro, "You must be nuts or crazy". He then called the police. (Tr. 132). At that time some men attempted to stop Harrington from leaving work. Caponigro was present. (Tr. 134).

Harrington admitted that Caponigro did not ask for a kickback, but asked for a bonus. [Tr. 172). He also testified that of the Five Hundred and Forty Three Dollars received by Caponigro, about the sum of Two Hundred odd Dollars was actually due the latter. (Tr. 193).

At the trial the government produced a Court Reporter who testified to the veracity of a portion of a transcript containing unsworn statements made by Caponigro at a union meeting where he had been called to respond to union charges. Caponigro's statements were read to the jury over the strenuous objections of his attorneys. In his statement read to the jury by the Court Reporter Caponigro had stated essentially that he had been accused of taking a bribe, and that actually the money received by him had been taken with the understanding that William Orton was to receive half. The reporter also testified that Caponigro had stated at the union hearing that Orton did in fact receive half. The objection to the introduction of the testimony was supported by Caponigro's testimony at trial that his appearance before the union examiner was under duress and coercion. He testified that he had to appear and respond to questions or he would have been suspended from the union and his position lost. (Tr. 250-251).

(e) REASONS FOR ALLOWANCE OF THE WRIT

I

WHETHER A CONVICTION OF EXTORTION CAN LEGALLY BE ENTERED WHEN ALL THE EVIDENCE SHOWS THAT ALL MONIES INVOLVED WERE PAID VOLUNTARILY.

In this case there is no contention that any force or fear was inflicted by petitioner prior to July of 1969. The testimony concerned implied threats which were made after the last check of August 1969. No money was received after Harrington returned from vacation, which was after the checks had been received. There could have been no extortion resulting in obstruction of commerce after that time since no money was received by Caponigro after that time. It was never contended that any threats were made to Orton. The most that can be gleaned from the testimony is the possibility of extra pay given a shop steward by way of a bribe.

This Court considered the Hobbs Act in **Stirone v. United States**, 361 US 212, 4 L ed 2d 252, 80 S. Ct. 270 (1960). It was stated there:

> "Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's juris-

> diction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."

Extortion is defined in Title 18, Section 1951 (b)(2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

There is certainly no force, violence or threats here as appeared in the facts of **Esperti v. U.S.**, 406 F. 2d 148, cert. den. 91 S. Ct. 241, 400 U.S. 942, 27 L. ed. 2d 246 (1969).

A difference between Title 18, Section 1951 and Title 18, Section 1952 is applicable to this case. In Section 1952, the "travel act" bribery is an included offense. Bribery is not included in Section 1951.

At the time the checks were received in July and August of 1969 no fear had ever been created, either on the part of Orton or Harrington. No violence had existed; no threats had been made.

In fact Harrington agreed that about one-half of the money received by Caponigro was due. (Tr. 193). That admission makes it clear that the money was given volun-

tarily and not through coercion albeit the checks were not stopped as soon as Orton and Harrington wanted. The genesis of the payment was not, however, extortion.

It is also clear that under this situation none of the proof of the elements necessary under **Stirone**, supra, existed. No interference with commerce resulted from force, violence or fear. The mere fact that C. A. Gibeaut Company did business with an Ohio firm in no way proves interference with interstate commerce, merely the existence of interstate commerce.

The Harrington threat, charged under Count II, took place at Christmas time, 1969. It never resulted in payment of money, and interference of any kind with commerce. It would at most, have presented a State charge of assault or attempted assault. There was certainly no interference with interstate commerce in the personal threat against an employee who swore that he was without power to make any payments.

The holding in this case and the conviction of Petitioner is in total conflict with Title 18, Section 1951 as interpreted by this Court in **Stirone**, supra.

II

AT A TRIAL THE INTRODUCTION INTO EVIDENCE OF PRIOR UNSWORN TESTIMONY GIVEN UNDER DURESS AT A UNION HEARING DEPRIVES A DEFENDANT OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION, AND SIXTH AMENDMENT RIGHT TO COUNSEL.

The conviction and affirmation are completely at odds with the rule of law announced by this Court in **Garrity v. State of New Jersey**, 385 US 493, 17 L. ed. 2d 562, 87 S. Ct. 616 (1967) and **Spevack v. Klein**, 385 US 511, 17 L. ed. 2d 574, 87 S. Ct. 625 (1967).

In this case Petitioner testified and the testimony was uncontradicted. He testified that he was called by telegram to appear before the union; that he was told by a high ranking union official that he had to testify or "lose his book"—that he would be thrown out of the union. (Tr. 250-251). He would not have testified without that warning by the union official. (Tr. 252). Before the notes of his testimony were read to the jury the court was advised that Petitioner had not been represented at the union hearing by counsel. (Tr. 276).

Nonetheless, over objection by counsel Petitioner's testimony at the union hearing was read, in part, to the jury.*

Garrity, supra, specifically held that in subsequent criminal proceedings, statements received in prior coerced hearings could not be introduced. As a matter of fact two of the difficulties found in the dissenting opinion in **Garrity**, do not exist in this case. There were no Constitutional warnings given in the case at bar and Petitioner was not represented by counsel in this case.

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*Although counsel at the trial acceded to the introduction of the testimony that position was taken only after the Court refused to suppress the Court Reporter's testimony.

CONCLUSION

Petitioner respectfully urges the granting of the Petition for Writ of Certiorari.

Respectfully submitted,

MILTON E. GRUSMARK
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By _____
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to the Attorney General's Office, 1350 N.W. 12th Avenue, Miami, Florida 33136, this 1st day of December, 1972.

MILTON E. GRUSMARK

EXHIBIT "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARMANDO CAPONIGRO,
Defendant-Appellant.

No. 71-3495

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1972.

Rehearing and Rehearing En Banc
Denied Oct. 4, 1972.

* * *

PER CURIAM:

The indictment charged the defendant with having obstructed and affected interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. Both counts charged that the defendant was employed as a shop steward.[1]

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[1]The indictment charged:

"That at all times hereinafter mentioned, defendant ARMANDO CAPONIGRO was employed by the prime contractor Burk Brothers, Inc., as shop steward for members of Local 1947, United Brotherhood of Carpenters and Joiners of America, employed by Burk Brothers, Inc., and as shop steward was the representative of said Union members on said Hemispheres Site and personally responsible for receiving and handling grievances of Union members."
(R. 617.)

Count 1 covered a period from November 1, 1968 to August 20, 1969 and charged that during that period the defendant threatened C. A. Gibeaut, Inc., the subcontractor for concrete form work, with work stoppages and other labor troubles, and by such extortion demanded and obtained $545.30 in checks from C. A. Gibeaut, Inc.

Count 2 covered a period from August 27, 1969 to December 26, 1969 and charged that during that period the defendant threatened C. A. Gibeaut, Inc. and its representative William Harrington with work stoppage and labor problems and did in fact slow down and delay the work by calling Union carpenters off the site and slowing down their production. Count 2 further charged that the defendant attempted to extort money by personally threatening William Harrington on December 26, 1969, in violation of the Hobbs Act.

The jury found the defendant guilty on both counts. After entering its judgment of conviction and denying the defendant's motion for new trial, the court sentenced the defendant to imprisonment for 10 years on each count, the sentences to run concurrently.

The defendant presents thirteen numbered issues for review on appeal, including the denial of a continuance, the denial of motions to dismiss the indictment, for better response to a bill of particulars, for subpoena fees and investigative costs, various evidentiary rulings, the court's refusal to charge the jury that bribery and extortion are mutually exclusive crimes, a claim that "the verdict was against the weight of the evidence," and finally that "an accumulation of errors deprived the defendant of a fair trial."

A careful study of the record, including a typed transcript of more than 600 pages, in the light of the briefs and oral arguments has convinced us that no reversible error was committed. In our opinion, the Government's brief adequately responds, though in different order, to each of the issues presented for review by the defendant. The question of the defendant's guilt was for the jury, and the evidence was ample to support its verdict. The judgment is therefore.

Affirmed.

EXHIBIT "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARMANDO CAPONIGRO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 25, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 4, 1972)

Before BROWN, Chief Judge, and RIVES and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

EXHIBIT "C"

SUPREME COURT OF THE UNITED STATES

No. A-482

ARMANDO CAPONIGRO

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1972.

s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 6th day of November, 1972.